SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1063

THRIFT DRUG, A DIVISION OF J.C. PENNEY COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statute Involved 3

Statement of the Case 3

Reasons for Granting the Writ 7

1. The decision below is contrary to the rationale of this Court's decision in *Savair* 7

   a. *Savair* held that union fee waivers can interfere with Section 7 rights 7

   b. The decision below ignores the *Savair* rationale 8

   c. The huge waiver of fees rendered a reasoned choice in the election impossible 8

2. The decision below is in direct conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *NLRB* v. *Gilmore Industries* 11

3. The failure of the Fifth Circuit Court of Appeals to grant an evidentiary hearing was an abuse of discretion and constitutes a denial of fundamental due process 13

   a. Petitioner's election objections raised material issues of fact which properly can be resolved only at an evidentiary hearing 13

PAGE

b. The Supreme Court, in relying upon factual determinations made at a hearing in *Savair*, recognized the appropriateness of such a proceeding in an analogous situation 15

c. In addition to being improper under the decisions of this Court, the failure to grant a hearing was improper under the decisions of both the Board and the Fifth Circuit 16

4. The decision below sanctions the outright purchase of votes in derogation of the salutary purposes of the Act 17

CONCLUSION 18

APPENDIX A—

Opinion of the Court of Appeals for the Fifth Circuit 1a

APPENDIX B—

Judgment of the Court of Appeals for the Fifth Circuit 4a

APPENDIX C—

Decision and Order of the National Labor Relations Board 6a

APPENDIX D—

Selected Excerpts from the Text of the National Labor Relations Act 18a

APPENDIX E—

Copies of Letters Sent to the Eligible Voters by the Employer on August 10 and 16, 1973 ..... 19a

PAGE

APPENDIX F—

Copies of Letters Sent to the Eligible Voters on August 17 and 22, 1973, in which Local 1058 Waived Fees and Assessments 23a

APPENDIX G—

Excerpt from the Regional Director's Supplemental Decision 27a

APPENDIX H—

Telegram Denying Employer's Request for Review and Motion for Reconsideration 29a

APPENDIX I—

Excerpt from Employer's Brief to the Fifth Circuit 30a

APPENDIX J—

Excerpts from Employer's Letter of November 1, 1973, to NLRB Region 6 ..... 34a

TABLE OF AUTHORITIES

Cases:

Allied Foods, 189 NLRB 513 (1971), *enforced*, 456 F.2d 1286 (5th Cir. 1972) 16

DIT-MCO, Inc., 163 NLRB 1019 (1967) 10, 12

Gilmore Industries, 140 NLRB 99 (1962) 11
Gilmore Industries, 143 NLRB 781 (1963) 11
Gulton Industries v. *NLRB*, 469 F.2d 1371 (5th Cir. 1972) 16

PAGE

Lobue Bros., 109 NLRB 1182 (1954) 12

NLRB v. *Crest Leather Mfg. Corp.*, 414 F.2d 421 (5th Cir. 1969) 10
NLRB v. *DIT-MCO*, 420 F.2d 775 (8th Cir. 1970) 10
NLRB v. *Exchange Parts*, 375 U.S. 405 (1964) 7
NLRB v. *Gilmore Industries*, 341 F.2d 240 (6th Cir. 1965) 2, 11, 12
NLRB v. *Gorbea, Perez & Morell, S. en C.*, 300 F.2d 886 (1st Cir. 1962) 10
NLRB v. *Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679 (1st Cir. 1964) 9, 14
NLRB v. *Indiana and Michigan Electric Co.*, 318 U.S. 9 (1943) 13, 17
NLRB v. *Savair Mfg. Co.*, 414 U.S. 270 (1973) 2, 3, 5, 6, 7, 8, 10, 12, 14, 15

Statutes:

National Labor Relations Act, as amended (29 U.S.C. §151 et seq.) 3, 7, 17

Regulations:

National Labor Relations Board Rules and Regulations, 29 C.F.R. 102.69(f) (1974) 16

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Thrift Drug, a Division of J.C. Penney Company, Inc., (hereinafter the "Petitioner" or "Employer"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 6, 1975.

Opinions Below

The opinion of the Court of Appeals is not yet officially reported. It is annexed as Appendix A, pp. 1a-3a.[1] The decision and order of the National Labor Relations Board (hereinafter "the Board") is reported at 215 NLRB No. 51 (App. C, pp. 6a-17a).

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[1] The various appendices will be cited subsequently as "App. —, pp. —."

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Is the decision of the United States Court of Appeals for the Fifth Circuit, which found that the Union's waiver of $350 in initiation fees and assessments did not interfere with the free choice of the eligible voters, inconsistent with the decision of this Court in *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973)?

2. Did the Fifth Circuit err by sanctioning, in summary fashion, the Board's consistent and repeated refusal even to consider whether a fee waiver of the magnitude involved herein could have interfered the reasoned choice of eligible voters?

3. Should this Court resolve the conflict between the decision of the United States Court of Appeals for the Sixth Circuit in *NLRB* v. *Gilmore Industries*, 341 F.2d 240 (6th Cir. 1965), and the decision of the Fifth Circuit in the instant matter?

4. Has the Fifth Circuit denied fundamental due process by failing to order an evidentiary hearing, despite the existence of substantial and material factual issues which mandated such a hearing—such as the question of the impact of the fee waiver on the eligible voters and the question of the amount of fees usually assessed by the Union—and despite Petitioner's steadfast and earnest request for such a hearing at every stage of these proceedings?

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.* (hereinafter "the Act"), are annexed (App. D, p. 18a).

Statement of the Case

This case presents a question not directly addressed in this Court's decision in *Savair*, which is critical to the administration of the Act; i.e., whether a union's waiver of initiation fees and assessments, because of the enormity of the amounts involved, can, standing alone, so impede the reasoned choice of eligible voters as to taint a representation election.

On April 6, 1973, the Laborers' International Union of North America, Construction, General Laborers and Material Handlers Local Union No. 1058, AFL-CIO (hereinafter "Local 1058" or "the Union") filed a petition for a representation election at a warehouse in Pittsburgh operated by the Petitioner. On August 8, 1973, after a representation hearing, the Regional Director for the Sixth Region of the National Labor Relations Board directed an election in a unit of Petitioner's warehouse employees.

Several weeks prior to the election, the costs of union membership were placed in issue before the eligible voters. Specifically, on August 10th and 16th, the Employer advised the employees that union membership entailed such financial obligations as initiation fees, dues, and other fees and assessments, informing them of Local 1058's policy of collecting as much as $420 in fees and hourly assessments from its members during the first year of their member-

ship.[2] On the following day, the Union announced to all of the eligible voters that it was waiving fees and assessments valued at $350.

> "This letter is to certify (in writing) that after LOCAL UNION No. 1058 wins the NLRB election . . . the only expense to you will be the normal six dollars a month dues. There will be no initiation fees, assessments or fines." (App. F, p. 23a).

This certification was signed by both the President and the Business Manager of Local 1058.

In a letter dated August 22nd, just two weeks prior to the election, the Union reaffirmed that it was waiving all fees and assessments except the monthly dues:

> "Your only cost . . . is a six dollar monthly dues."

The Union also enclosed a copy of the August 17th certification with this letter.[3]

The representation election was conducted on September 7, 1973. Of approximately 119 eligible voters, 106 ballots were cast, with 52 for unionization, 27 opposed and 27 challenges. On September 12, the Employer timely filed objections to the election, alleging, *inter alia*, that the Union had offered improper financial inducements to influence eligible voters to cast their votes for the Union.

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[2] Copies of the literature in which the amounts of these fees and assessments were set forth are annexed (App. E, pp. 19a-22a). The figure of $420 was arrived at as follows: The $.10 hourly assessment charged to members in the Pittsburgh area had a minimum yearly cost of $208. This, plus $150 in initiation fees and $72 in dues equals a first year liability of at least $420.

[3] It is undisputed, and the Fifth Circuit so found, that the value of the Union's waiver was $350 (App. A, pp. 2a-3a).

On December 12, 1973, the Regional Director issued a Supplemental Decision in which he overruled the Employer's objections and directed a hearing for the sole purpose of resolving the challenges to the ballots.[4] On December 17, 1973, this Court issued its decision in *Savair*. On December 28, 1973, the Employer filed with the Board a Request for Review and Motion for Reconsideration of the Regional Director's Supplemental Decision, specifically requesting that the Regional Director be directed to reconsider his decision in light of the Supreme Court decision in *Savair*.

On February 12, 1974, the Board, in a one-half page telegram, summarily denied the Employer's request and motion, wholly relying upon the Regional Director's pre-*Savair* analysis (App. H, p. 29a). Thereafter, certain of the challenges were resolved and a revised tally was issued showing 53 votes for the Union, 34 against, 16 challenges, and one void ballot.[5] The Union was certified on March 28, 1974.

On May 15, 1974, the Union filed charges alleging that the Employer refused to bargain with the Union as required by §8(a)(1) and (5) of the Act. A Complaint and Notice of Hearing was issued by the Regional Director acting on behalf of the Board's General Counsel. Petitioner joined issue, denying certain of the allegations and setting forth, *inter alia*, the following affirmative defenses:

1. The "Board did not conduct a lawful and proper representation election as required under the Act,

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[4] The pertinent portion of the Regional Director's Supplemental Decision is annexed (App. G, pp. 27a-28a).

[5] Thus, out of the 103 valid votes counted in the revised tally, the Union's 53 votes constituted just one more vote than the required majority.

and therefore a valid certification was not issued by the Board."

2. The "Board issued an invalid certification inasmuch as [the Union] offered unlawful financial inducements and bribes to eligible voters, and the Board, notwithstanding this improper conduct, refused to set aside the election."

On May 27, 1974, General Counsel moved for summary judgment. On December 4, 1974, this motion was granted by the Board, which again relied on the Regional Director's pre-*Savair* analysis and ordered the Employer to bargain with the Union.

Thereafter, the Employer petitioned the United States Court of Appeals for the Fifth Circuit to review and set aside the Board's order, and the Board cross-petitioned for enforcement.

On October 15, 1975, the Fifth Circuit issued a per curiam decision granting enforcement of the Board's order. The Fifth Circuit found that the Union had waived $350 in fees, but held that the waiver was lawful because "the Union's waiver of about $350 of fees for each employee in the present case was unconditional . . ." The Court thus narrowly limited *Savair* to situations involving waivers conditioned upon the signing of authorization cards and failed to give consideration to the actual impact of the instant waiver. (App. A, pp. 1a-3a). Judgment was entered on November 6, 1975 (App. B, pp. 4a-5a).

Reasons for Granting the Writ

1. *The decision below is contrary to the rationale of this Court's decision in Savair.*

a. *Savair* held that union fee waivers can interfere with Section 7 rights.

In *Savair*, this Court held that a union unlawfully interfered with employees' Section 7 rights to refrain from union activities by offering to waive its $10 initiation fee for those employees who signed union authorization cards prior to a representation election. In refusing to sanction the Board's approval of such a fee waiver, this Court stated:

> "Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. . . . The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union. . . ." 414 U.S. at 278, 280.

In holding the *Savair* fee waiver to be impermissible, the Court recognized such waivers for what they are—economic inducements. Citing *NLRB* v. *Exchange Parts*, 375 U.S. 405 (1964), the Court found the *Savair* situation analogous to the objectionable conduct of "an employer who promises to increase fringe benefits by $10 for each employee who votes against the union." 414 U.S. at 278. Thus, this Court recognized that financial inducements may be improper, whether offered by a union or by an employer, and that such inducements should be carefully scrutinized and kept within permissible bounds.

b. The decision below ignores the *Savair* rationale.

In its per curiam decision, the Fifth Circuit Court of Appeals ignored the principles underlying *Savair*. Rather than consider the impact of the huge economic inducement upon the eligible voters, the Fifth Circuit mechanically sanctioned the Board's narrow reading of *Savair*. In the view of both the Fifth Circuit and the Board, *Savair* stands only for the proposition that conditional fee waivers are improper. Both tribunals wholly ignored this Court's thorough analysis of the impact of fee waivers and of other similar economic inducements.

It is respectfully submitted that *Savair* requires close scrutiny of all economic inducements offered to eligible voters prior to a representation election. The *Savair* rationale does not permit a fee waiver of $350 to be declared proper simply because it was not conditioned upon the signing of union authorization cards. In order that the Fifth Circuit's decision comport with *Savair*, the impact of the instant fee waivers must be carefully examined to determine if they impeded the reasoned choice of eligible voters.

c. The huge waiver of fees rendered a reasoned choice in the election impossible.

It is undisputed that Local 1058 eliminated long-established fees normally imposed upon new members in order to influence the outcome of the election. Moreover, the Union waived hourly assessments valued at a minimum of $208 per year, bringing the "total package" for employees to $350. Surely this outright attempt to buy support was not sanctioned by this Court in its *Savair* decision. Nor can the Fifth Circuit's upholding of the waiver be justified by the traditional argument that initiation fees are artificially imposed barriers with which

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unions are at liberty to dispense.[6] This case involves much more. It involves a waiver of traditional ongoing obligations of membership in the Laborers' Union in order to create the impression in the minds of the eligible voters that they were to be the recipients of an offer too good to be passed up: the benefits of representation by the Laborers' without the traditional costs of such representation. It is difficult to regard this offer as anything less than a bribe which could not have been disregarded by the eligible voters.

There is no significant difference between the waiver in this case and the impermissible gifts discussed in the *Savair* decision, the latter involving free life insurance, gift certificates, or fees to attend union meetings,[7] except that the instant waiver constitutes a larger bribe and therefore a greater inducement to vote for the Union. The similarity between a waiver and such gifts has also been recognized by the First Circuit in *NLRB* v. *Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679 (1st Cir. 1964):

> "[S]ince a penny saved is a penny earned we have difficulty in seeing why a $10 bribe to join the union is septic . . . while a promise to waive a 'regular' $25 initiation fee is benign because there is a contingency." 328 F.2d at 681.

An employee who receives a waiver offer will have no difficulty in determining that the union is, in effect, putting money in his pocket. As the First Circuit stated:

> "We do not quarrel with the finding that giving an employee a glass of beer is not an unfair labor practice . . . but initiation fees are dollars, and their

[6] See *Savair, supra,* at 274, n.4.

[7] 414 U.S. at 279, n.6.

> significance in this case is attested by the prominence the Union gave to the matter." *NLRB* v. *Gorbea, Perez & Morell, S. en C.*, 300 F.2d 886, 888 (1st Cir. 1962).

That Local 1058 recognized the value of the waiver as a "vote-getter" is evident from the Union's repetition of its offer prior to the election (App. F, p. 26a). Obviously, such a large economic inducement had an impact upon eligible voters, but, as noted, no effort was made to ascertain just how great an impact. Not once during these proceedings, either before Region Six, the Board or even the Fifth Circuit, has this issue been addressed. The Union has been permitted successfully to offer what is in reality a bribe of considerable proportions without ever having either its motives or the impact of the waiver investigated. We submit that this unthinking certification is inconsistent with the *Savair* rationale, and it should not be given this Court's imprimatur.[8]

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[8] It is interesting to note that the dissenting opinion of Justice White (joined by Justices Brennan and Blackmun) in *Savair*, recognized that the waiver of an initiation fee may not be a permissible organizing tool where large amounts are involved. Justice White repeatedly referred to the small initiation fee ($10.00) involved in *Savair*, stating:

> "Since the . . . costs and benefits is marginal where a *small fee* is involved, the issue here resolves into the proper allocation of institutional responsibility between an administrative agency and a reviewing court." 414 U.S. at 289. (Emphasis added).
>
> • • •
>
> "[T]he decision of the union to waive *small fees* was not coercive. . . . I, therefore, respectfully dissent." *Id.* at 290. (emphasis added).

Even the "pre-*Savair* cases" of *NLRB* v. *Crest Leather Mfg. Corp.*, 414 F.2d 421 (5th Cir. 1969) and *NLRB* v. *DIT-MCO*, 420 F.2d 775 (8th Cir. 1970), upholding fee waivers, involved only the small fee waivers of $2.00 to $10.00, and $15.00, respectively, a long way from the $350 involved here.

2. *The decision below is in direct conflict with the decision of the United States Court of Appeals for the Sixth Circuit in NLRB v. Gilmore Industries.*

Counsel is aware of only one case which has involved a fee waiver comparable to that involved here. In that case, *NLRB* v. *Gilmore Industries, supra,* the Sixth Circuit Court of Appeals reached a decision opposite to that reached by the Fifth Circuit in the instant matter.

Gilmore involved facts strikingly similar to those involved here. In that case, in order to counteract a rumor in the plant that the union intended to charge an initiation fee of $300, the union waived its initiation fee. Rather than indicate precisely what its fee was, the union, as the Laborers' did here, simply announced that it was waiving its fee. The union then won the election and the employer filed timely objections.

The Regional Director set aside the election, but the Board, in a 3-2 vote[9] reversed and certified the election results. Gilmore then refused to bargain, and the Board, again in a 3-2 vote, found Gilmore guilty of an unfair labor practice under §8(a)(5) and (1). 143 NLRB 781 (1963).

The Sixth Circuit reversed. Relying upon the fact that the Gilmore employees could reasonably have concluded that a fee of $300 had been waived, the Court made it clear that by leading the employees to believe that such a large waiver was being made, the union had offered a substantial economic inducement which constituted an undue influence on eligible voters:

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[9] The dissenting Board members stated: "The proffered waiver . . . constituted a clear promise of benefit calculated to induce employees to vote for union representation and tended to interfere with the free choice of the employees." *Gilmore Industries,* 140 NLRB 99, 102-03 (1962) (Members Rodgers and Leedom dissenting).

> "In determining whether there was an interference with the employees' freedom of choice, we cannot detach the waiver of initiation fees from the circumstances under which it was made. We must consider all of the relevant facts and circumstances of the case. We conclude that the economic inducement offered by the union was material and impeded a reasoned choice." 341 F.2d at 242.

In the instant matter, Thrift employees were led to believe that they were receiving an even larger waiver than the Gilmore employees. Moreover, like the Union in *Gilmore*, Local 1058 was responding to initiation fee information which had already been introduced into the campaign.

Thus, the Fifth Circuit's sanctioning of a union waiver of fees and assessments valued at $350 is in direct conflict with the decision of the Sixth Circuit in *Gilmore*. The Fifth Circuit failed to deal with *Gilmore*, and it did not cite judicial support for its decision except its own narrow analysis of *Savair*. It merely ruled that there were "no additional 'circumstances' " warranting reversal of the Board.

Petitioner respectfully submits that the view of the Sixth Circuit is the correct one, and it requests this Court to resolve the conflict between the Circuits by granting review in this matter.[10]

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[10] Petitioner urges that the Board's purported "expertise" in this area should not be given controlling weight, since the Board has long vacillated on the question of whether waivers can constitute improper economic inducement. See, i.e., *Lobue Bros.*, 109 NLRB 1182 (1954) and *DIT-MCO, Inc.*, 163 NLRB 1019 (1967). Of course, as discussed above, the Supreme Court rejected the Board's view in *Savair*. Despite this, however, in this case the Regional Director and the Board relied upon reasoning specifically rejected by this Court in *Savair*. (See excerpt from Petitioner's Brief to the Fifth Circuit in this matter, which is annexed (App. I, pp. 30a-33a)).

3. *The failure of the Fifth Circuit Court of Appeals to grant an evidentiary hearing was an abuse of discretion and constitutes a denial of fundamental due process.*

In *NLRB* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9 (1943), this Court recognized the importance of permitting parties before the Board properly to present their evidence before a decision affecting their rights was rendered:

> "The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case had been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed." 318 U.S. at 28.

Petitioner has earnestly sought an evidentiary hearing in this matter throughout these proceedings. A request for such a hearing was first made during the Regional Director's administrative investigation[11] and has been renewed at every stage of the proceedings. Petitioner respectfully submits that the refusal to grant such a hearing, despite the existence of material and substantial factual issues, was an abuse of discretion and a denial of due process.

a. Petitioner's election objections raised material issues of fact which properly can be resolved only at an evidentiary hearing.

While Petitioner contends that the Union's waiver of $350 in fees justifies, as a matter of law, reversal of the Fifth Circuit's decision with directions to set aside the

[11] See, e.g., excerpts from Petitioner's letter of November 1, 1973 (App. J, pp. 34a-35a).

Board's certification, it alternatively submits that the Union's conduct raised numerous factual issues, which, at a minimum, necessitate a hearing.

As discussed above, in assessing the impact of the Union's conduct, it should be determined whether the waiver had the tendency to influence eligible voters. A hearing would provide an opportunity to receive evidence on *employee impact;* e.g., how many employees were aware of the waiver, what they knew about the nature and scope of the fees involved, and to what extent employees considered the waiver prior to the election. In addition, evidence could be adduced at a hearing as to the facts underlying the waiver; e.g., what were the Union's practices with regard to the collection of fees and hourly assessments, precisely what amounts were involved,[12] how did the Union distribute its waiver and what did its representatives say to employees concerning the financial inducements.

A hearing would also provide the Employer with an opportunity to present testimony which would establish (1) that the employees were aware of the substantial financial inducements the Union was offering, and (2) that the Union's waiver greatly influenced their votes because of

[12] It is conceivable that Local 1058's broad waiver may have misled the employees as to the amount of money involved. For example, in *NLRB* v. *Gorbea, Perez & Morell, S. en C., supra,* the union announced to the employees that it was waiving its $25.00 initiation fee, which, in fact, it never charged. Finding that the union had engaged in "a bold attempt to buy membership at a phonily reduced rate," the Court set aside the Board's bargaining order, since the union was not the freely designated bargaining representative. 328 F. 2d at 683.

See also the *Savair* dissent where Justice White refers to the view expressed in *NLRB* v. *Gorbea, Perez & Morell, S. en C.,* stating:

> "A different case might be put if the Union purported to remove a non-existent fee or artificially inflated fee so as to misrepresent the benefit tendered by its removal." 414 U.S. 283.

their concern about their financial obligations should the Union win.

In the absence of facts concerning these matters, it was not possible for the Fifth Circuit or the Board properly to evaluate the impact of the waiver upon Petitioner's employees. Because this inquiry goes to the heart of the Board's function in supervising the conduct of parties in the election arena, the Fifth Circuit should be instructed to direct the Board to conduct an evidentiary hearing to receive evidence on these critical questions.

b. The Supreme Court, in relying upon factual determinations made at a hearing in *Savair*, recognized the appropriateness of such a proceeding in an analogous situation.

It is important to note that in reaching its decision in *Savair*, this Court had the benefit of an evidentiary hearing. A Board hearing examiner made findings, *inter alia*, as to the pressures brought to bear upon the eligible voters and as to their motivation in signing the authorization cards. The *Savair* Court, moreover, made extensive reference to the hearing examiner's report and relied upon the examiner's findings in reaching a decision. See, e.g., 414 U.S. at 272-74, n.4. Manifestly, where complex questions about the impact of economic inducements upon eligible voters exist, an evidentiary hearing, as in *Savair*, will provide a necessary forum for a proper resolution of such issues.

c. In addition to being improper under the decisions of this Court, the failure to grant a hearing was improper under the decisions of both the Board and the Fifth Circuit.

Section 102.69(f) of the Board's Rules and Regulations, Series 8, as amended, provides in pertinent part:

> "if it appears to the Board that . . . exceptions raise substantial and material factual issues, the Board may direct the Regional Director or other agents of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer." [13]

The Board has consistently interpreted this section as mandatory, rather than discretionary. For example, in *Allied Foods,* 189 NLRB 513 (1971), *enforced,* 456 F.2d 1286 (5th Cir. 1972) the Board stated:

> "[W]hen the moving party presents a prima facie showing of 'substantial and material issues' which warrant setting aside the election . . . he is *entitled* to an evidentiary hearing." 189 NLRB at 515. (emphasis added).

The Fifth Circuit Court of Appeals agrees that this rule is mandatory. In *Gulton Industries* v. *NLRB,* 469 F. 2d 1371 (5th Cir. 1972), it stated:

> "A hearing is *required* when the Company presents substantial and material factual issues." 469 F. 2d at 1374. (emphasis added).

Petitioner submits that the substantial and material factual issues surrounding the Union's waiver in the present case, mandate a full evidentiary hearing under both Board and Fifth Circuit law. Moreover, as noted, this

[13] 29 C.F.R. 102.69 (f) (1974).

Court has indicated its reluctance to sanction Board proceedings in which the parties have not been afforded ample opportunity to present their respective positions. *NLRB* v. *Indiana and Michigan Electric Co., supra.* Petitioner has diligently sought such an opportunity, but the Board and the Fifth Circuit have refused to grant a hearing despite the existence of material and substantial factual issues. Petitioner respectfully submits that this refusal constitutes an abuse of discretion, and it requests this Court to grant review of the Fifth Circuit decision.

4. *The decision below sanctions the outright purchase of votes in derogation of the salutary purposes of the Act.*

The Board's election process has been set up to ensure the unfettered exercise by employees of their Section 7 rights. The integrity of this process, as enforced by the Board and monitored by the Courts, is an essential element in our national labor policy to foster industrial harmony through the reasoned and peaceful resolution of labor disputes.

By sanctioning the outright purchase of votes in this case, the Fifth Circuit Court of Appeals has condoned union behavior in derogation of the salutary purposes of the Act. The Fifth Circuit has announced to this and other unions that it will not scrutinize union bribes to eligible voters so long as these undesirable inducements are in the form of fee waivers. Regardless of whether these waivers are normally assessed fees or "artificially inflated fees," this decision cannot help but encourage unions to bypass normal and proper methods of persuasion in favor of the more convincing vehicle of a direct economic inducement. A decision with such an inevitable consequence warrants review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

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